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No. 09-756

Supreme Court, U S
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In The
Supreme Court of the United States

JEFFREY C. BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS, MARK BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS, REBEKAH L. BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS AND RENEE B. BOURGEOIS,

Petitioners,

v.

BOOMTOWN, L.L C OF DELAWARE, PINNACLE ENTERTAINMENT, INC. OF DELAWARE, M/V BOOMTOWN BELLE II AND LOUISIANA A-1 GAMING, A LOUISIANA PARTNERSHIP IN COMMENDAM,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal, Fifth Circuit, State Of Louisiana

REPLY BRIEF

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ARGUMENT FOR GRANTING THE WRIT

Defendant's opposition brief in this case fully supports Petitioner's argument that conflicting decisions exist among and between federal and state courts as to whether a riverboat casino (built for navigation with a motor, captain, crew, and having navigated) but which remains dockside to conduct gaming activities constitutes a "vessel" under federal admiralty law. As Defendants cannot hide the conflicting decisions, instead it makes an attempt to distinguish a *few* of the "pro-vessel" cases from the "non-vessel" cases, then conclude that there is no "split" among circuits or conflicting decisions among courts throughout the country.[1] Nothing could be

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[1] **Courts finding "vessel" status for dockside riverboat casinos:** *Board of Commissioners of Orleans Levee District v. M/V Belle of Orleans*, 535 F 3d 1299 (11th Cir 2008); *Tagliere v. Harrah's Ill. Corp.*, 445 F.3d 1012 (7th Cir. 2006); *Breaux v. St Charles Gaming*, Case No. 2005-000272 (14th JDC, La. 2007); *Booten v. Argosy Gaming Company d/b/a Alton Belle Casino*, 848 N E.2d 141, 146 (Ill 3rd Cir 2006); *In re AMGAM Ass'n*, 239 B.R. 737 (S.D. Miss 1999); *Credit Suisse First Boston Mortgage Capital, LLC v. Doris*, 102 F Supp 2d 709, 713 (N D. Miss. 2001) *See also Davis v Missouri Gaming Company d/b/a Argosy Riverside Casino*, 51 S.W. 3d 168 (Mo. App. W D. 2001) (Jones Act case wherein dockside riverboat casino "may" be a vessel).

Courts finding "no vessel" status for dockside riverboat casinos: *De La Rosa v St Charles Gaming Co* , 474 F 3d 185 (5th Cir 2006); *Pavone v Mississippi Riverboat Amusement Corp* , 52 F.3d 560, 570 (5th Cir 1995); *Davis v Players Lake Charles Riverboat*, 74 F. Supp. 2d 675, 676 (W.D. La. 1999); *In re Silver Slipper Casino Venture, LLC*, 264 Fed Appx 363 (5th Cir 2008) *See also* Jones Act cases finding "no vessel" status *Martin v. Boyd Gaming*, 252 F Supp. 2d 321

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further from the truth, and this issue is a legal "mess," begging for this Court's intervention to provide uniform recovery to riverboat casino plaintiffs.[2]

As will be clearly demonstrated below, Defendant's purported "distinctions" are not only

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(E.D. La. 2003); *Howard v Southern Illinois Riverboat Casino Cruises*, 364 F.3d 854 (7th Cir 2004); *Hertz v Treasure Chest Casino*, 274 F. Supp. 2d 795 (E D. La. 2003); *Watson v Indiana Gaming Co.*, 337 F Supp. 2d 951 (E.D. Ky 2004)

[2] Defendant further attempts to distract this Court from the pure legal issue of whether the M/V BOOMTOWN BELLE satisfies the jurisdictional requirements for maritime law by attempting to discredit the plaintiff with respect to the nature of his injuries *See* Defendant's Opposition at 3 ("Mr. Bourgeois had significant blood alcohol content at the time of his death. Also found in his blood was the cocaine metabolite, benzoylecgonine, indicative of recent cocaine ingestion and impairment") While Plaintiffs deny that the cause of plaintiff's death was anything other than alcohol intoxication pursuant to the policies of the M/V BOOMTOWN BELLE as confirmed the state trooper on the scene of the accident, that the nature of plaintiff's injuries are irrelevant in determining whether M/V BOOMTOWN BELLE satisfies the two-prong *Grubart* test for maritime jurisdiction under the Admiralty Extension Act. *See, e g , Tagliere v. Harrah's Ill Corp.*, 445 F.3d 1012 (7th Cir 2006) (casino patron's injury in falling off a stool "had nothing to do with the fact that the casino was on a boat afloat on a navigable stream rather than sitting on dry land. * * * There is, therefore, commonsense appeal . that the suit is not within admiralty jurisdiction. But the most important requirement of a jurisdictional rule is not that it appeal to common sense but that it be clear * * * Congress has extended the admiralty jurisdiction to 'all cases of . injury . . . caused by a vessel on navigable waters . . includ[ing] the vessel's . . furniture. [Plaintiff's] injury resulting from the defective stool . . was an injury caused by a vessel"); *Grubart, Inc v Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 115 S Ct. 1043 (1985).

irrelevant, but actually false. Unequivocally, a circuit split exists, as well as numerous other inconsistent decisions among and between state and federal courts, as to whether a riverboat casino built for navigation but which conducts dockside gaming constitutes a "vessel" under federal law. ***It is imperative that this Honorable Court intervene to provide plaintiffs in these matters the uniform recovery which was intended by a federal body of law such as general maritime law.***

I. *PAVONE V. MISSISSIPPI RIVERBOAT AMUSEMENT CORP.*, 52 F.3d 560 (5th Cir. 1995) IS NOT DISPOSITIVE OF THE ISSUE OF VESSEL STATUS FOR RIVERBOAT CASINOS IN LOUISIANA AND HAS CREATED A CIRCUIT SPLIT AND INCONSISTENT DECISIONS ACROSS THE COUNTRY.

Defendant incorrectly states that in *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 125 S. Ct. 1118 (2005) this Court "specifically cited the case of *Pavone* . . . as an example of a 'floating casino' that was '***no longer a vessel*** where it was moored to the shore in a semi-permanent or indefinite manner'." *See* Defendant's Opposition at 11. However, this statement is highly misleading, as the structure in *Pavone* most likely was ***never*** a "vessel", and therefore did not "lose" vessel status as suggested (it could not lose what it did not have). Moreover, the Mississippi *Pavone* casino structure is not the same type of casino structure as the Louisiana M/V BOOMTOWN BELLE

at issue before this Court. *See, e.g., Davis v. Players Lake Charles Riverboat, Inc.*, 74 F. Supp. 2d 675 (W.D. La. 1999) (Louisiana district court noted the distinction between ***Louisiana*** riverboat casinos built for navigation and required to sail, versus the *Pavone* ***Mississippi*** casino structures which are nothing more than floating restaurants, bars and casinos, never built for navigation).

In *Pavone*, a Jones Act case, the structure called the BILOXI BELLE might have just as well been land-based, and is nothing more than a legal "ruse" for gaming not on "land". *Pavone*, 52 F.3d at 560. *Pavone* involved a fixed structure ***never*** built for navigation, ***never*** required to have navigated under state law, had no motor, captain, crew, pilot house (except for decoration), and was permanently attached to the shore in such a manner that you cannot tell the difference between the land and the shore when entering. *Id.* at 563-66. Casino structures in the state of Mississippi, such as in *Pavone*, by state law, ***are entirely different and distinct*** – and to the best of undersigned counsel's knowledge and belief, from any other jurisdiction in the United States – in that Mississippi permits gaming activities over water on non-navigable structures never required to navigate or carry passenger, ***and are nothing more than fixed structures built over water***. *Id.*

Specifically, the U.S. Fifth Circuit explained that

> the structure . . . is situated on a barge that was constructed at Morgan City, Louisiana,

for the express purpose of supporting ***a floating restaurant and bar*** [in] Texas. * * * After a while, [it] was re-outfitted as a casino, towed to Biloxi and renamed the Biloxi Belle. The BILOXI BELLE was moored to the shore by lines tied to sunken steel pylons that were filled with concrete. The first level of the BILOXI BELLE was connected to the pier by steep ramps, and the second level was joined to the shore-side building. * * * **The BILOXI BELLE has no engine, no captain, no navigational aids, no crewquarters and no lifesaving equipment. For visual effect only, the BILOXI BELLE is outfitted with a decorative pilot house containing no operating parts other than a single light switch . . . no steering mechanism. . . . Likewise a motorized but nonfunctional paddle wheel is affixed** [with] water outlets [to] product spray to give the appearance of function, but the heel rests permanently above the water **level and serves no propulsion function.** * * * **[T]he subject barge has never been used as a seagoing vessel to transport passengers, cargo, or equipment across navigable waters. Neither was it originally constructed to do so. The BILOXI BELLE employs no navigational or nautical crew; all**

> **workers thereon are employed solely in connection with the casino operation.**

Id.[3]

Conversely, the riverboat casino at issue in this case, the M/V BOOMTOWN BELLE, along with the riverboat casinos in the entire line of cases finding "vessel" status, ***are* wholly different structures than that in *Pavone*** – the M/V BOOMTOWN BELLE, along with the other watercraft in the "pro-vessel" cases, are all ***boats*** – built specifically for navigation, navigated and carried passengers, and are required ***to be fully capable of navigation at all times***. *See* Plaintiff's Application at 8-15, 19-27 (citing *Board of Commissioners of Orleans Levee District v. M/V Belle of Orleans*, 535 F.3d 1299 (11th Cir. 2008) (Louisiana dockside riverboat casino *is* a "vessel" under *Stewart*); *Tagliere v. Harrah's Ill. Corp.*, 445 F.3d 1012 (7th Cir. 2006) (Illinois dockside riverboat casino admitted it was a "vessel" under the Seventh Circuit's criteria); *Booten v. Argosy Gaming Company d/b/a Alton Belle Casino*, 848 N.E.2d 141, 146 (Ill. 3rd Cir. 2006) (pursuant to *Stewart*, defendant riverboat casino is a "vessel," despite that it

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[3] Further, even courts within Mississippi declined to follow *Pavone* and found that the casino structures in Mississippi were "vessels" under federal admiralty law! *See, e.g., In re AMGAM Ass'n*, 239 B.R. 737 (S.D. Miss. 1999) (Mississippi riverboat casino *is* a "vessel" under federal admiralty law); *Credit Suisse First Boston Mortgage Capital, LLC v. Doris*, 102 F. Supp. 2d 709, 713 (N.D. Miss. 2001) (Mississippi riverboat casino is a "vessel" as defined by 1 U.S.C. Section 3).

"stopped cruising [in] 1999, the day after the law changed to allow gambling to occur [dockside] and has no plans to resume cruising, [because] [t]he Alton Belle is clearly capable of maritime transportation"); *Breaux v. St. Charles Gaming*, Case No. 2005-000272 (14th JDC, La. 2007) (Louisiana riverboat casino is a "ves-sel"). *See also Davis v. Missouri Gaming*, 51 S.W.3d 168 (W.D. App. Mo. 2001) (riverboat casino "may" be a "vessel" for Jones Act purposes because it was built for navigation and floated).

Nevertheless, the U.S. Fifth Circuit and its district courts thereunder have followed *Pavone* for the holding that navigable riverboat casinos in Louisiana are not "vessels," even for general maritime cases, simply because they remain dockside to conduct gaming activity, pointing to *Pavone*. *See, e.g., De La Rosa*, 474 F.3d at 185 (5th Cir. 2006) (pursuant to *Pavone*, Louisiana riverboat casino, built for navigation, navigated, and required at all times to be capable of navigation, was not a "vessel" under general maritime law); *Hertz v. Treasure Chest Casino*, 274 F. Supp. 2d 795 (E.D. La. 2003) (finding the rationale of Pavone "persuasive" and denied plaintiff's Jones Act claim, finding that Louisiana riverboat casino was not a vessel); *Ward v. Boy Gaming Corp.*, 2004 WL 422012 (W.D. La. 2004) (Louisiana riverboat casino not a "vessel" for Jones Act claim, citing *Pavone*).

However, ***failing to distinguish a Pavone-fixed structure – a structure wholly incapable of navigation and only decorated to look like an***

old-fashioned "paddlewheel" – versus a fully functioning seagoing vessel is akin to finding that a carnival cruise ship is no different than a hotel built on water. The U.S. Fifth Circuit line of cases applying *Pavone* to the navigational riverboat casinos have misapplied federal admiralty law, resulting in a circuit split, as well as inconsistent decisions among courts across the country on this issue.

II. DEFENDANT'S ATTEMPT TO DISTINGUISH PLAINTIFF'S "PRO-VESSEL" RIVERBOAT CASINO CASES ARE MISLEADING AND IRRELEVANT

A. *Tagliere v. Harrah's Ill. Corp.*, 445 F.3d 1012 (7th Cir. 2006).

Defendant argues that the *Tagliere* decision "did not rule on whether admiralty jurisdiction existed [and] remanded the matter". *See* Defendant's Opposition at 19 (citing *Tagliere*, 445 F.3d at 1016). However, this statement is misleading as the Defendant riverboat casino in *Tagliere* ***conceded*** ***"vessel" status after the ruling issued by the U.S. Seventh Circuit, and did not dispute the issue of maritime jurisdiction further!*** *See Tagliere v. Harrah's*, Case No. 04 C 5258, Docket Entry 7/17/06 (N.D. Ill. 2004).[4] In *Tagliere*, the district court decision found

[4] Undersigned counsel contacted plaintiff's counsel in *Tagliere* to determine the outcome of the issue of "vessel" status

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that Defendant, Harrah's, a dockside riverboat casino, was a "vessel" under general maritime law, but dismissed plaintiff's claim on other grounds. *Tagliere*, 2005 WL 1126892 (N.D. Ill. 2005) at *2-3 ("[t]his Court concludes that the Harrah's Casino Riverboat is a vessel") (citing *Howard v. Illinois Riverboat Casino Cruises*, 364 F.3d 854, 856 (7th Cir. 2004). On plaintiff's appeal, the U.S. Seventh Circuit reversed the dismissal, implicitly finding that the riverboat casino ***did*** satisfy the second prong of the "nexus" test, but remanded in light of the recent *Stewart* decision by the U.S. Supreme Court, explaining that:

> [t]he difference between "permanently" and "indefinitely" [moored] in this context is vague and has not been explored by the parties. The *Stewart* case suggests that the boat must be permanently incapacitated from sailing. Yet maybe – by analogy to the difference between domicile and residence – a boat also is "permanently" moored when its owner intends that the boat will never again sail, while if he has not yet decided its ultimate destiny it is only "indefinitely" moored. These are matters for exploration on remand.

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after the Seventh Circuit's remand. Plaintiff's counsel advised that after the U.S. Seventh Circuit issued its ruling,, counsel for Defendant appeared before the district court and advised that it conceded vessel status and would not contest the issue of maritime jurisdiction any further. *See Tagliere v. Harrah's*, Case No. 04 C 5258, Docket Entry 7/17/06 (N.D. Ill. 2004).

Tagliere, 445 F.3d 1016. However, on remand, with the Seventh Circuit's factors articulated, **defendant Harrah's Riverboat casino conceded that it was a vessel and advised the district court it would not contest maritime jurisdiction any longer**! *See Tagliere v. Harrah's,* Case No. 04 C 5258, Docket Entry 7/17/06 (N.D. Ill. 2004).

B. *Board of Commissioners of the Orleans Levee District v. M/V Belle of Orleans,* 535 F.3d 1299 (11th Cir. 2008).

Defendant further argues that *Belle of Orleans* is inapplicable because it a) "concerned whether a maritime lien existed [and] 'courts have historically tended to more narrowly construe the definition of vessel' in a maritime tort case than in a maritime lien case"; and because b) the Belle of Orleans boat had broke loose of its "permanent" moorings and therefore at that moment became a vessel. *See* Defendant's Opposition at 16-17. Defendants misquote the *Belle of Orleans* case, as it clearly says "courts have historically tended to more narrowly construe the definition of vessel in ***Jones Act cases***, ***NOT "maritime tort cases"*** as it tries to suggest to this Court. *See Belle of Orleans*, 535 F.3d at 1309. Additionally, the absurdity of Defendant's second argument is obvious – Defendant submits that any-time a boat breaks free of its "permanent" moorings, such as during a hurricane, it automatically converts to a "vessel" at that instant. Under this logic, anything that breaks free from land – such as sheet

piling being tossed during a hurricane – becomes a "vessel". Further, under defendant's logic, if the M/V BOOMTOWN BELLE should break free of its moorings tomorrow causing damages, a plaintiff *tomorrow* can recover under federal maritime law, but if injured *today* while tied to the dock, he cannot. This Court in *Stewart* clearly set forth a test which bestows "vessel" status upon any watercraft which is "capable of navigation" regardless of whether it was actually navigating at the time of the injury, not just "anything that floats". *See Stewart*, 543 U.S. at 494-95, 125 S. Ct. at 1127-28.[5]

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[5] Defendant attempts to distinguish two (2) additional riverboat casino cases (*Young* and *Quinn*) in the section of its brief that it argues that the M/V BOOMTOWN BELLE is not a "vessel" under the first "location" prong of the *Grubart* test However, *Young* and *Quinn* were clearly cited by plaintiff with respect to the ***second*** prong of the *Grubart* test for maritime jurisdiction under the Admiralty Extension Act test (***connection to maritime activity***) and are inapplicable and non-instructive as to the first "***location***" (***vessel status***) prong of the test. Defendant does not distinguish or address why these cases would not be instructed as to the second prong of the test and ignores that concept entirely. *See* Defendant's Opposition at 18, 20-21 (citing *Young v. Players Lake Charles, LLC*, 47 F. Supp. 832 (S D Tx. 1999); *Quinn v. St. Charles Gaming Co* , 815 So. 2d 963 (La App. 3d Cir 2002)).

C. *Horak v. Argosy Gaming Co.*, 648 N.W. 2d 137 (Ia. 2002)

Defendant claims that *Horak* "involved an action brought under the Iowa Dram Shop Act [and] provides no guidance for this Court." *See* Defendant's Opposition at 20-21. Once again, defendant's submission to this Court is misleading, as in *Horak*, the ***defendant*** riverboat casino **claimed that federal maritime law applied rather than state law**, and thus the court was required to determine whether the riverboat casino satisfied the "location" and "connection to maritime activity" *Grubart* two-prong test for maritime law to apply. *Horak*, 648 N.W.2d at 145-146. Notably, the court found that the defendant riverboat casino satisfied the two-prong *Grubart* test for maritime jurisdiction as it was a "vessel" and the activity at issue had a "connection to maritime commerce." *Id.* Accordingly, this case is instructive on that point.

CONCLUSION

In conclusion, plaintiffs urge this Court to grant its Petition for Writ of Certiorari and set the matter for oral argument to resolve once and for all the issue of whether a dockside riverboat casino constitutes a "vessel" under the Admiralty Extension Act. Plaintiffs submit to this Honorable Court that a boat which was constructed for navigation, navigated, and is required to remain fully capable of navigation for the carriage

of 600 or more passengers, is a "vessel" under the Admiralty Extension Act.

Respectfully submitted,

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